

UNITED STATES BANKRUPTCY COURT
DISTRICT OF SOUTH CAROLINA

IN RE:

Café Enterprises, Inc., *et al.*,¹

DEBTORS.

Chapter 11

Case No. 18-05837-hb

Case No. 18-05838-hb

Case No. 18-05839-hb

Case No. 18-05840-hb

OBJECTION OF STORE MASTER FUNDING V, LLC TO DEBTORS' NOTICE OF CURE AMOUNTS AND PROPOSED ASSUMPTION AND ASSIGNMENT OF EXECUTORY CONTRACTS AND LEASES

STORE Master Funding V, LLC ("Landlord")² hereby files this objection (the "Cure Objection"), by and through its undersigned counsel, to the *Debtors' Notice of Cure Amounts and Proposed Assumption and Assignment of Executory Contracts and Leases* [Dkt. No. 355] (the "Cure Notice").³ In support of the Cure Objection, Landlord respectfully represents as follows:

I. BACKGROUND FACTS

1. The Debtors in the above-captioned chapter 11 cases (the "Debtors"), filed their voluntary petitions for relief under Chapter 11 of Title 11 of the United States Code on November 15, 2018 (the "Petition Date"). Debtors continue to operate their businesses and manage their properties as debtors-in-possession pursuant to 11 U.S.C. §§ 1107(a) and 1108.⁴

¹ The Debtors in these cases, along with the last four digits of each Debtor's federal tax identification number, are: Cafe Holdings Corp. (7910); Cafe Enterprises, Inc. (4946); CE Sportz LLC (2009); and CES Gastonia LLC (0863). The location of the Debtors' corporate headquarters is 4324 Wade Hampton Blvd., Suite B, Taylors, South Carolina 29687.

² STORE Master Funding V, LLC is the Landlord pursuant to that certain Amended and Restated Master Lease dated October 18, 2016. The Cure Notice incorrectly lists STORE Master Funding I, LLC as the Contract Counter Party.

³ Terms not defined herein shall have the meanings ascribed to them in the Cure Notice and accompanying documents.

⁴ Unless specified otherwise, all statutory references to "Section" are to 11 U.S.C. §§ 101 et seq. (the "Bankruptcy Code").

2. Debtor Café Enterprise, Inc. (“Tenant Debtor”) leases restaurant space (the “Leased Premises”) from the Landlord pursuant to that certain unexpired Amended and Restated Master Lease dated October 18, 2016 (the “Lease”) at the locations set forth in detail on the attached Exhibit A.

3. The Debtors filed the *Debtors’ Expedited Motion, Pursuant to Bankruptcy Code Sections 105(A), 363, and 365, and Bankruptcy Rules 2002, 6004, and 6006 and 6006, for Entry of Orders (I) Approving Sale, Bidding, Notice, and Auction Procedures in Connection with the Sale of Substantially All of the Assets of the Debtors; (II) Approving Assumption and Assignment of Certain Executory Contracts Unexpired Leases; (III) Authorizing the Sale of the Debtors’ Assets Free and Clear of All Liens, Claims, Encumbrances, and Other Interests, and (IV) Granting Related Relief* [Dkt. No. 106] (the “Procedures Motion”) on November 30, 2018. On January 10, 2019, the Court entered the *Order Regarding Bid and Auction Procedures, Establishing Deadlines and Scheduling Sale Hearing* [Dkt. No. 335]. A sale hearing is scheduled for February 12, 2019 [*id.*].

4. On January 15, 2019, Debtors filed the Cure Notice and served notice on counterparties to leases the Debtors intend to assume. The Cure Notice did not specify the leases to be assumed, and, instead, listed the Leased Premises to be assumed.⁵

5. The amounts set forth in the Cure Notice do not reflect all outstanding balances due and owing to Landlord under the Lease, and the proposed cure amounts do not account for accrued but unbilled charges which may come due in the future. The cure amounts set forth by the Debtors must be modified to reflect the additional charges owing, as well as recognize the liability for accruing and other charges due under the Lease, as more fully set forth herein.

6. Furthermore, the Leased Premises are leased pursuant to a master lease. The Lease is an enforceable, unitary lease that must be assumed or rejected in its entirety. While the Cure Notice lists all

⁵ Exhibit A to the Cure Notice incorrectly identifies two store locations owned by Landlord as “Rock Hill, NC” and “Aiken, GA”. The correct locations for these stores are “Rock Hill, SC” and “Aiken, SC”.

of the Leased Premises under the Lease for assumption, the Cure Notice must be amended to clarify that Debtors are assuming the Lease, *in toto*, without modification.

II. THE DEBTORS' PROPOSED CURE AMOUNT DOES NOT PROVIDE FOR PAYMENT OF ALL OBLIGATIONS DUE UNDER THE LEASE

7. The Landlord's cure, as compared to the Debtors' cure is summarized in Exhibit B, which is attached hereto and incorporated herein by this reference.⁶

8. In addition to the current outstanding rent and other monthly charges due under the Lease, in determining what must be paid as cure pursuant to Section 365(b), the charges referenced below must also be taken into consideration and paid by the Debtors or any assignee, either as cure or when properly billed under the Lease.

i. Year-end adjustments and reconciliations

9. Tenant Debtor remains responsible for all accrued or accruing charges under the Lease, and must pay such charges when they come due under the Lease. The Tenant Debtor (or successor) assumes the Lease subject to its terms, and must assume all obligations owing under the Lease, including obligations that have accrued but may not yet have been billed under the Lease. Any final order approving the assumption and assignment of the Lease should require the Tenant Debtor (or successor) to assume these lease obligations and pay them when due, regardless of whether they relate to the period prior to, or after, the assumption and assignment. In addition, any provision in an order approving the assumption and assignment of the Lease that purports to release the Tenant Debtor (or successor) of further liability based upon a payment of cure amounts, must specify that such release does not apply to obligations to pay accrued or accruing, but unbilled, charges that come due under the Lease.

⁶ Landlords' Cure does not include charges that are billed directly to Tenant Debtor, including real estate taxes. To the extent Landlord is later billed for any amount due to Tenant Debtor's failure to pay, or to the extent that there are other charges that come due under the Lease after the date of this Cure Objection, Landlord reserves the right to payment of these amounts when billed in the ordinary course under the Lease (and to amend this Cure Objection to the extent necessary for any amounts that come due under the Lease through the date of any cure payment).

10. Further, the Lease requires the Tenant Debtor to indemnify and hold the Landlord harmless with respect to any existing claims which may not become known until after the assumption of the Lease, examples of which may include such claims as personal injuries at the Leased Premises and damage to the Leased Premises by the Tenant Debtor or its agents. Any assumption of the Lease must be subject to the terms of the Lease, including the continuation of all indemnification obligations, regardless of when they arose.⁷ In the alternative, the Tenant Debtor (or successor) must provide (by insurance or otherwise) that it can satisfy the indemnification obligations under the Lease for any claims that relate to the period prior to assumption of the Lease. Nothing in any order approving the assumption and assignment of the Lease should preclude the Landlord from pursuing the Tenant Debtor, its insurance, or any other party that may be liable under the Lease, and the Landlord requests that any order specifically preserve its right to pursue such rights irrespective of any resolution of cure amounts herein.

ii. Attorneys' fees, costs, and interest

11. The Lease contains provisions for recovery of attorneys' fees, costs, and interest in the event the Landlord is required to take legal action to protect its interests. The Tenant Debtor is obligated to cure all defaults under the Lease, and compensate the Landlord for its actual pecuniary losses as a result of defaults under the Lease. See 11 U.S.C. § 365(b)(1)(A) and (B). The principle is well-recognized. See, e.g., *In re Greenviell Am. P.Ship*, No. 00-00721-W, 2000 Bankr. LEXIS 2008, at *33 (Bankr. D.S.C. Mar. 24, 2000) (debtor may not assume a lease unless it cures its default); *In re LCO Enterprises*, 12 F.3d 938, 941 (9th Cir. 1993); *Elkton Associates v. Shelco Inc. (Matter of Shelco)*, 107 B.R. 483, 487 (Bankr. D. Del. 1989) (debtor allowed to assume lease provided it cured *all pre-petition defaults*).

12. The Tenant Debtor (or successor) takes the Lease *cum onere*—subject to existing burdens. The Tenant Debtor cannot assume the favorable portions, and reject the unfavorable provisions, of the

⁷ Any ability to assume, or assume and assign, the Lease is subject to the protections provided by Section 365(b) and (f). Therefore, any assumption or assumption and assignment of the Lease must be in accordance with all provisions of the Lease.

Lease. *In re Wash. Capital Aviation & Leasing*, 156 B.R. 167,172 (Bankr. E.D. Va. 1993); *Three Sisters Partners, L.L.C. v. Harden (In re Shangri La, Inc.)*, 167 F.3d 843, 849 (4th Cir. 1999). If forced to continue in the performance of the Lease, the Landlord is entitled to the full benefit of the bargain with the Tenant Debtor. *See Three Sisters Partners*, 167 F.3d at 849 (“tenant must make the landlord whole for his losses and give him the benefit of his bargain”).

13. The “full benefit of the bargain” principle has been held to require payment of interest. “The cure of a default under an unexpired lease pursuant to 11 U.S.C. § 365 is more akin to a condition precedent to the assumption of a contract obligation than it is to a claim in bankruptcy. One of the purposes of Section 365 is to permit the debtors to continue in a beneficial contract; provided, however, that the other party to the contract is made whole at the time of the debtor’s assumption of the contract.” *In re Entm’t, Inc.*, 223 B.R. 141, 151 (Bankr. N.D. Ill. 1998) (citation omitted; bankruptcy court allowed interest at 18%). Interest on pre-petition lease charges continues to run from the filing of the Debtors’ petitions and must be paid as a condition of the assumption of the Lease. *See In re Skylark Travel, Inc.*, 120 B.R. 352055 (Bankr. S.D.N.Y. 1990). Interest calculations are therefore not cut short by the automatic stay, and payment of such interest is required to fully compensate Landlord for the Tenant Debtor’s default under the Lease, and thus to properly assume the Lease. Finally, post-petition interest is allowable where, as here, such interest is provided for under the terms of the Lease. *Cukierman v. Uecker (In re Cukierman)*, 265 F.3d 846, 853 (9th Cir. 2001).

14. Attorneys’ fees and costs incurred in enforcement of the covenants, obligations, and conditions of a lease are also proper components of a cure claim, and the Tenant Debtor (or successor) must satisfy these lease charges as part of the assumption or assumption and assignment of the Lease. *In re Trak Auto Corp.*, 277 B.R. 655, 669 (Bankr. E.D. VA 2002) (reversed on other grounds) (“When debtor assumes a lease, it must assume the entire lease, which includes provisions contained in a lease that award a lessor attorney’s fees.”); *Entm’t, Inc.*, 223 B.R. at 152 (citation omitted). There is no logical distinction for purposes of Section 365 between attorneys’ fees incurred in connection with pre-petition defaults and fees

incurred with post-petition defaults. *Entm't, Inc.*, 223 B.R. at 154. The fact that a landlord uses bankruptcy procedures to enforce a lease should not preclude recovery of attorneys' fees and costs for such enforcement activity (particularly where the Bankruptcy Court is the exclusive forum where the landlord can obtain any relief, being foreclosed from state court relief by the automatic stay). *Id.*, see also, *In re Crown Books Corporation*, 269 B.R. 12 (Bankr. D. Del. 2001) (Landlords' fees and costs are recoverable as a component of cure under 11 U.S.C. § 365(b)(1)); *Urban Retail Props. v. Loews Cineplex Entm't Corp., et al.*, 2002 WL 5355479 (S.D.N.Y. Apr. 9, 2002) (where lease "provides for recovery of attorneys' fees and interest, their receipt deserves the same priority under Section 365(d)(3) as any of the debtors' other obligations that arise post-petition"); *Three Sisters Partners*, 167 F.3d at 850. The Supreme Court has upheld the enforceability of such attorneys' fees clauses, ruling that pre-petition attorneys' fee clauses were enforceable with respect to issues peculiar to bankruptcy law. *Travelers Casualty & Surety Co. of America v. Pacific Gas & Electric*, 127 S. Ct. 1199, 1206 (2007).

15. Accordingly, Landlord further requests that it be reimbursed for all of its actual pecuniary losses including, but not limited to, attorneys' fees and costs expended with regard to Tenant Debtor's bankruptcy proceedings. The cure amount set forth on Exhibit B includes attorneys' fees billed as of the date of this objection, as well as an estimate for future attorneys' fees in the amount of \$5,000. To the extent necessary, Landlord will provide a reconciliation of the actual fees and costs incurred at the time of the assumption of the Lease.

iii. Adequate Assurance of future performance

16. This Objection has previously noted the necessity for Tenant Debtor (or successor) to provide by insurance (or otherwise) that it can satisfy the indemnification obligations under the Lease. Landlord further submits that the Tenant Debtor (or successor) and the Stalking Horse (or any upset bidder) must provide the Court and parties in interest (including Landlord) proof of its financial stability, including adequate cash to immediately pay any undisputed cure amounts. Landlord reserve the right to further amend this Cure Objection upon review of any proffer of financial stability.

III. THE DEBTOR MUST ASSUME MASTER LEASE IN TOTO

17. Landlord leases the Leased Premises to Tenant Debtor pursuant to an enforceable, unitary master lease. In the Cure Notice, Debtors' list separate proposed cure amounts for each Leased Premises rather than one cure amount due under the Lease. Landlord objects to any implication that Leased Premises leased pursuant to a master lease may be severed from the Lease.

18. A debtor cannot assume the benefits and reject the unfavorable aspects of the same contract. *See Three Sisters Partners*, 167 F.3d at 849 (“When the debtor assumes its unexpired lease, however, it assumes it *cum onere*—the debtor must accept obligations of the executory contract along with the benefits.”); *Stewart Title Guar. Co. v. Old Republic Nat. Title Ins. Co.*, 83 F.3d 735, 741 (5th Cir. 1996); *In re Buffets Holdings, Inc.*, 387 B.R. 115, 121-23 (Bankr. D. Del. 2008).

19. Where the parties intend for the contract to be non-severable, a court cannot rewrite the contract in a manner that would undermine the parties' bargain. *See Ginett v. Computer Task Grp., Inc.*, 962 F.2d 1085, 1099 (2d Cir. 1992) (“We would, in short, be writing a new contract for these people if we broke this single promise up into separate deals; and the new contract so written by us might be, for all we know, most unjust to one or the other party.”) (citing *New Era Homes Corp. v. Forster*, 299 N.Y. 303, 306 (1949)); *Buffets*, 387 B.R. at 124 (“To allow the Debtors to reject one of the leases without continuing to pay the total rent would be to destroy the essence of [the landlord's] bargain”); *E. Hampton Sand & Gravel Co., Inc.*, 25 B.R. 193, 199 (Bankr. E.D.N.Y. 1982) (“Severance of the note from the lease would deny the creditor the benefit of his bargain and would result in an unjust windfall for the debtor.”); *see also In re United Air Lines, Inc.*, 453 F.3d 463, 472 (7th Cir. 2006) (“While the parties could have separated this complex arrangement into two contracts, they did not, and their decision . . . cannot now be undone after the fact . . .”).

20. Accordingly, it is critical to analyze the provisions of the Lease as a whole in order to determine the intent of the parties, and not just to look at individual provisions. *See, e.g., Buffets*, 387 B.R. at 121-22 (holding that master lease was non-severable, notwithstanding express apportionment of

consideration, because such evidence was only one factor, and not conclusive for determining the intent of the parties). Here, the Lease is a true master lease. Tenant Debtor pays one base annual rent and the Lease has a single term, with extension options, for all the Leased Premises under the Lease. Indeed, in the Lease, Landlord and Tenant Debtor agreed that they intended for the Lease to be construed as an “unseverable, unitary, and single lease of all, but not less than all, of the Properties...” Lease, Section 16.04.

21. Tenant Debtor may not assume certain Leased Premises leased under the Lease and reject other Leased Premises. The Lease must be assumed or rejected in its entirety. The Cure Notice, which lists proposed cure amounts for each Leased Premises rather than one cure amount due under Lease, must not be construed as effecting a severance of any Leased Premises from the Lease.

IV. THE CURE AMOUNTS SERVE ONLY AS ESTIMATES

22. Landlord can only provide the information presently available regarding amounts owing by Tenant Debtor, while reserving the right to amend the Cure Objection as necessary to include any additional or unknown charges that arise, including but not limited to subsequent rent defaults, attorney fees, costs, interest, and year-end adjustments and reconciliations. There is no basis to impose upon the Landlord the equivalent of an administrative bar date, limiting its recourse to recover charges to which it is entitled under the Lease.

V. IMMEDIATE PAYMENT OF UNDISPUTED CURE AMOUNTS

23. Section 365(b)(1)(A) requires that Tenant Debtor promptly cure outstanding balances due under the Lease upon its assumption and assignment. To the extent there is a dispute over the total cure obligation, all undisputed cure amounts should be paid immediately upon the effective date of the assumption and assignment of the Lease. At that time, Tenant Debtor should escrow disputed amounts, and the Court should set a status conference within thirty (30) days of the assumption or assumption and assignment of the Lease to deal with any disputes that remain unresolved after such period.

VI. CONCLUSION

Landlord respectfully requests that any order that provides for the assumption of the Lease (i) allow the cure amounts (subject to adjustment by the Landlord) in the amounts set forth herein, (ii) order payment of all undisputed cure amounts, with an escrow established that is sufficient to pay any remaining disputed cure amounts, when resolved by the parties or this Court, (iii) allow the assumption of the Lease, *cum onere*, subject to all of its terms, and in its entirety; and (iv) grant such further relief as the Court deems proper.

Respectfully submitted

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Dated: February 1, 2019

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